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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR DARIO BANEGAS,

Defendant and Appellant.

A155769

(San Mateo County
Super. Ct. No. 16-SF-012680)

Oscar Dario Banegas (appellant) appeals from imposition of a suspended six-year prison sentence following revocation of his probation. The trial court found that appellant had violated the terms and conditions of his probation by, among other things, testing positive for controlled substances. The court revoked probation, concluding appellant failed to take advantage of the “ample opportunities” the court provided to turn his life around.

Appellant argues the trial court abused its discretion in revoking appellant’s probation and refusing to reinstate it. We affirm.

PROCEDURAL BACKGROUND

In November 2016, the San Mateo County District Attorney filed an information alleging that appellant had committed first-degree residential burglary (Pen. Code, § 460, subd. (a); count one)¹ and criminal threats (§ 422, subd. (a); counts two & three) on

¹ All undesignated statutory references are to the Penal Code.

October 21. A sentencing enhancement was further alleged that appellant was on felony probation when the crimes were committed. (§ 1203, subd. (k).) In February 2017, pursuant to a negotiated disposition, appellant pled no contest to count one, counts two and three were dismissed, and the sentencing enhancement was stricken. The court determined it was in the interest of justice to place appellant on probation, due to his substantial history of drug and alcohol abuse. (§ 462, subd. (a).)² The court suspended imposition of the sentence and placed appellant on probation for three years. As a condition of probation, the court ordered appellant to serve one year in county jail. The court permitted appellant to serve that sentence in the “Jericho” residential treatment program.

On August 17, 2017, the probation officer petitioned to revoke appellant’s probation for failure to complete the treatment program. The petition alleged that appellant failed to obey all laws and failed to remain in and complete the Jericho treatment program as required by the terms of his probation. Appellant denied the probation violation allegations and was held without bail. On November 3, appellant admitted the probation violation allegations, and the trial court revoked probation. The trial court offered appellant a choice: The court could impose the four-year mid-term sentence; or it could impose the six-year aggravated term, suspend execution of the sentence, and place appellant on probation with the condition that he serve one year in jail, where he would enroll in the “Choices” treatment program.³ Following completion of Choices, appellant would be ordered to enroll in a residential treatment program.

² Section 462, subdivision (a) states in relevant part that, “Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person who is convicted of a burglary of an inhabited dwelling house” Section 462, subdivision (b) provides, “If the court grants probation under subdivision (a), it shall specify the reason or reasons for that order on the court record.”

³ Appellant was also sentenced to a consecutive eight-month prison sentence, imposition also suspended, relating to a separate criminal case.

Appellant chose the suspended sentence option, and the court sentenced him accordingly, extending his probation for three years.

On October 11, 2018, the probation officer again petitioned to revoke probation, alleging appellant failed a drug test on October 2. On October 26, the trial court found appellant in violation of probation, revoked probation, and imposed the six year prison term. Appellant timely appealed.

FACTUAL BACKGROUND

Criminal History

Appellant is a 37-year-old male who has been abusing drugs and alcohol for most of his life. At the age of 13, he first used alcohol. In his teens he began experimenting with cocaine and marijuana, and by 20 he had begun to use methamphetamine.

The probation report revealed that appellant has an extensive criminal record consisting primarily of misdemeanor offenses beginning in 1998 and continuing through the present burglary offense in 2016. Prior to the residential burglary in this case, appellant had been convicted of three counts of battery, illegally entering or remaining in a noncommercial dwelling, and carrying a concealed dirk or dagger. At least two of the offenses were committed while appellant was under the influence of drugs or alcohol.

Appellant's Efforts to Comply with the Conditions of Probation

The following information was introduced at the probation revocation hearing on October 26, 2018.

Appellant had been working with probation officer Alfonso Hernandez for about a year. After appellant completed the Choices program during his time in county jail in 2017 and 2018, Hernandez encouraged appellant to re-enter the long-term Jericho program that he had previously failed to complete. Appellant refused to go back, stating that "it was not the program for him." He subsequently enrolled in the "Latino Commission," a 90 day program, with Hernandez's approval.

On July 5, 2018, after completing the Latino Commission program, appellant voluntarily chose to enter a sober living environment (SLE) to support his continued

sobriety and to save money. Appellant testified he had a job in construction and attended Alcoholics Anonymous meetings.

In August 2018, Hernandez attempted to visit appellant at the SLE, but he was told appellant had been kicked out for undisclosed reasons. After appellant failed to respond to numerous calls and text messages, Hernandez sent a message to appellant stating he would file a petition to revoke probation if appellant did not report to the probation office the next day. Appellant called back promptly and scheduled a meeting for October 2.

On October 2, 2018, appellant reported to the probation office and submitted to a presumptive urine test, as required by the terms of his probation. His sample came back positive for cannabis, amphetamine, and methamphetamine. Appellant admitted to using marijuana, but, as to methamphetamine, he claimed his roommates had “spiked him” without his knowledge.

The trial court found appellant had been given “ample opportunities to turn his life around,” failed to take advantage of those opportunities, and was no longer a good candidate for probation.

DISCUSSION

It is undisputed that appellant violated the terms and conditions of his probation by using drugs, and, therefore, the only issue on appeal is whether the trial court abused its discretion in revoking appellant’s probation and refusing to reinstate it.

I. *Standard of Review*

A court may revoke probation “if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer . . . or otherwise that the person has violated any of the conditions of their [probation]” (§ 1203.2, subd. (a).) We review the trial court’s factual findings supporting revocation of probation for substantial evidence, and we review the trial court’s decision to revoke probation for abuse of discretion. (*People v. Butcher* (2016) 247 Cal.App.4th 310, 318.) We also review the trial court’s decision to deny reinstatement of probation for abuse of discretion. (*People v. Downey* (2000) 82 Cal.App.4th 899, 909 (*Downey*).) The sentencing court abuses its discretion when its determination is arbitrary, capricious, or

“ ‘exceeds the bounds of reason, all of the circumstances being considered.’ ” (*People v. Martinez* (1985) 175 Cal.App.3d 881, 896.) In the “absence of a clear showing that its decision was arbitrary or irrational,” a trial court is “presumed to have acted to achieve legitimate objectives and . . . its discretionary determinations” will not be set aside on appeal. (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573–574.)

II. *Analysis*

Appellant contends the trial court abused its discretion because “[n]othing supports the [trial] court’s conclusion [appellant] was manipulating the court or attempting to receive some measure of leniency to which he was not entitled.” The trial court found appellant’s testimony at the probation revocation hearing untrustworthy, and chose instead to believe Hernandez’s testimony. The court’s credibility findings will not be disturbed on appeal. (*Nevarez v. Tonna* (2014) 227 Cal.App.4th 774, 786.)

A. *The Trial Court Did Not Err in Revoking Probation*

At the probation revocation hearing, Hernandez testified that appellant informed him in July 2018 that he was going to enter into an SLE to save on rent. On September 7, after discovering appellant was no longer living in the SLE, Hernandez attempted to get in contact by calling and sending numerous text messages. Appellant, on the other hand, testified he tried numerous times to contact Hernandez. Hernandez testified the only communications he received from appellant during this time period were voicemails on September 19, informing him appellant had forgotten about an appointment, and September 20, when appellant said he had been trying to contact Hernandez every day. The call was made to Hernandez’s office phone after normal business hours, rather than to the cell phone number Hernandez had been using to contact appellant. Appellant claimed he wanted to contact Hernandez because he did not understand the terms of his probation, but he demonstrated at least partial understanding by informing the officer of his change of residence when he moved into the SLE, then subsequently failed to do so when he moved out of the SLE. The trial court was entitled to resolve the conflict in the testimony in favor of the probation officer, and conclude that appellant was attempting to evade contact with Hernandez, rather than strictly comply with the terms of his probation.

In addition, the court properly inferred from appellant's testimony that he refused to take responsibility for his actions, preferring instead to shift the blame to anyone but himself. Appellant blamed Hernandez for not being available to discuss the conditions of his probation and blamed his roommates for his failed drug test on October 2, 2018.

The record supports the trial court's findings that appellant was untrustworthy, and that his testimony was an attempt to manipulate the court. The court did not err in revoking probation.

B. *The Trial Court Did Not Abuse Its Discretion in Declining to Reinstate Probation*

In deciding whether to reinstate probation, a trial court must consider "all facts bearing on the offense and the defendant to be sentenced." (*Downey, supra*, 82 Cal.App.4th at p. 910.) In *Downey*, the court chose not to reinstate probation due to the appellant's demonstrated lack of commitment to following the terms of his probation, including a condition he stop using drugs. (*Id.* at 906.) In its decision to revoke probation, the court was particularly concerned about the danger appellant posed to the public due to his history of driving under the influence of drugs and alcohol. (*Ibid.*) The court held that the need to protect the public, and himself, precluded reinstatement of probation. (*Id.* at pp. 906–907.)

In the present case, appellant was arrested for residential burglary and for making criminal threats to a family outside of their home while he was high on methamphetamine. Appellant also has a history of committing other crimes while under the influence of drugs and/or alcohol. On the record before it, the trial court could reasonably find appellant is a danger to society when abusing drugs, and appellant either cannot, or will not, take the necessary steps to end his substance abuse. Because we cannot conclude the trial court's decision " 'exceed[ed] the bounds of reason, all of the circumstances being considered,' " the court did not abuse its discretion in declining to reinstate probation. (*Downey, supra*, 82 Cal.App.4th at p. 909.)

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A155769)